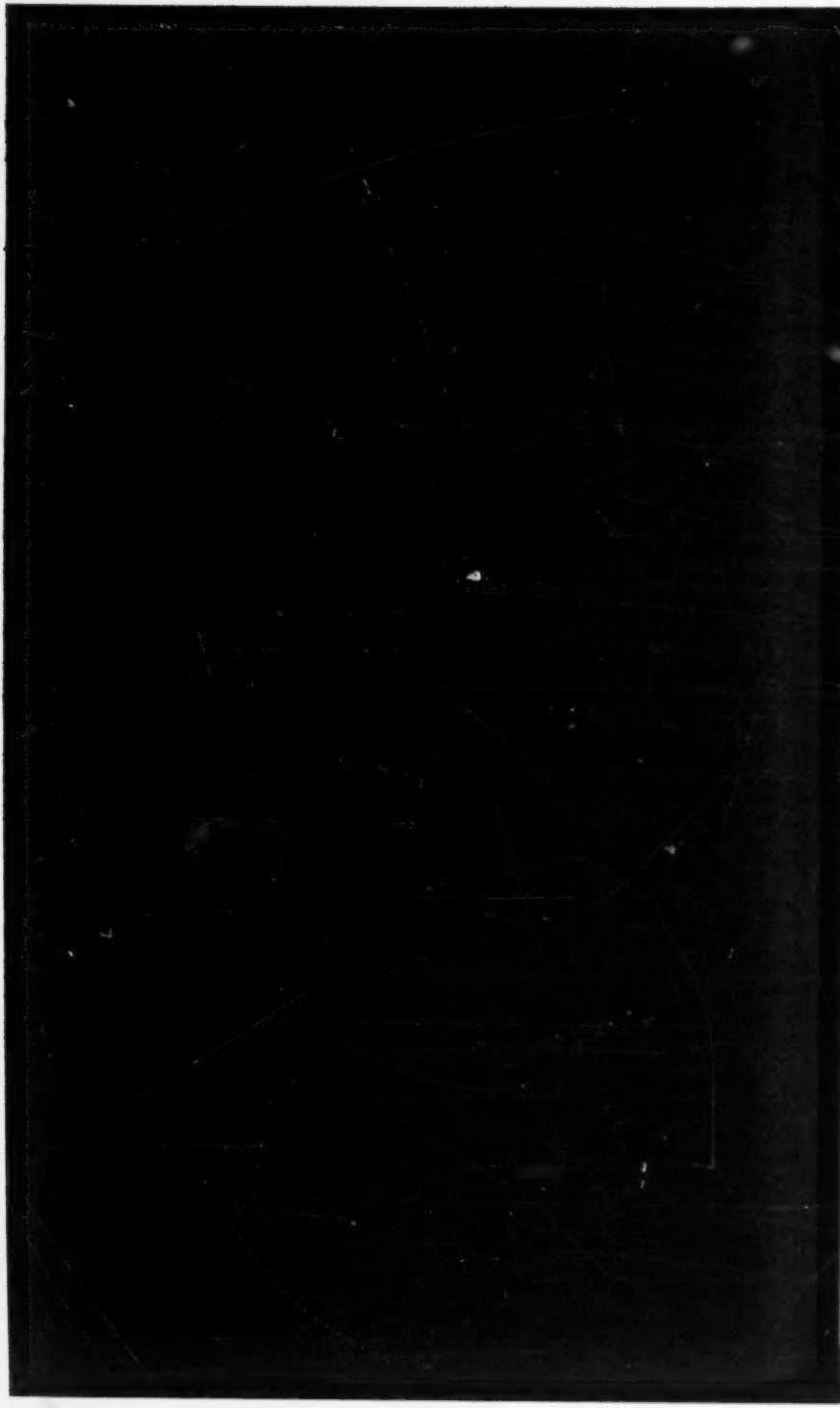

INDEX.

LIST OF CASES.

Supreme Court of the United States,

OCTOBER TERM, 1919.

No. 943.

CONSOLIDATED GAS COMPANY OF NEW YORK,
Complainant-Appellee,

AGAINST

CHARLES D. NEWTON, as Attorney General of the State of New York, EDWARD SWANN, as District Attorney of the County of New York, and LEWIS NIXON, constituting the Public Service Commission of the State of New York, First District,
Defendants (not appealing),

THE CITY OF NEW YORK,
Appellant.

BRIEF FOR APPELLEE.

Statement.

Appeal from an order of the Circuit Court of Appeals, Second Circuit, unanimously affirming an order of the District Court for the Southern District of New York, which denied the petition of the City of New York for leave to intervene as a party defendant in this cause.

The suit was brought to enjoin the enforcement of the so-called "Eighty-cent law" of New York (L. 1906, Ch. 125, limiting the price of gas to private

consumers in the Borough of Manhattan to eighty cents per thousand cubic feet), on the ground that the rate is confiscatory and, therefore, deprives the complainant of its property without due process of law.

In a previous suit by the complainant to have the Eighty-cent law declared invalid, this Court upheld the validity of the Act upon the evidence then before it, but left it open to the complainant to bring another suit in the future, if, after a reasonable trial, the rate proved to be confiscatory (Willcox *v.* Consolidated Gas Company, 212 U. S. 19). In that suit, the validity of another statute (L. 1905, Ch. 736), which prescribed a separate maximum rate of seventy-five cents per thousand cubic feet for gas supplied to the City of New York, was also attacked, and the City was, therefore, made a party defendant. In the present suit, that statute is not attacked; and the application of the City for permission to intervene was not for the purpose of protecting any direct interest of its own as a consumer, or to perform any duty imposed upon it by law, but only for the purpose of protecting individual consumers, on the general theory that it is entitled to act in such matters for the "general welfare" of its citizens.

The District Judge, in denying the petition, pointed out in his opinion (Record, pp. 19-27), that the private consumers were already properly and completely represented by the Public Service Commission, the Attorney General and the District Attorney, and that as the City had no interest in the litigation as a consumer and was not the governmental body which had established the rate and was not charged with the duty of enforcing it, it was neither a necessary nor a proper party and could not be permitted to intervene, under Equity Rule 37, as a party having "an interest in the litigation". He, therefore, denied the application to intervene as a matter of law (Record, pp. 28, 29).

POINTS.

FIRST.

Motion to dismiss.

A separate memorandum has been submitted, in connection with the motion to dismiss the appeal on the following grounds:

1. That the order is not appealable;

2. That even if the City might be considered a proper party, its application to intervene was addressed to the discretion of the court and cannot be reviewed;

3. That the entire question has become moot and academic, because the City, as a matter of fact, has been represented by its Corporation Counsel throughout the litigation and has actively participated in the trial of the case, which has now been concluded.

SECOND.

Parties defendant.

As Judge Mayer pointed out in his opinion in the District Court (Record, pp. 19-27), all of the public authorities charged with any duty in connection with the enforcement of the Eighty-cent Act were made parties defendant: the Public Service Commission, First District, the Attorney General and the District Attorney of New York County.

A complete copy of the Public Service Commissions Law (L. 1906, Ch. 429) is submitted herewith, showing the very broad regulatory powers conferred upon the Commission. The imperative duty is laid upon the Commission of enforcing, by summary

proceedings, all laws affecting gas and electric corporations and municipalities operating such utilities (Sec. 74).

The Attorney General and the District Attorney are charged with the duty of enforcing the penalties prescribed by the statute.

Code Civ. Pro., Sec. 1962.

(A copy of this Section is appended to the appellant's brief, p. 64.)

Section 68 of the Executive Law provides for the appearance of the Attorney General in all cases involving the constitutionality of an Act of the legislature.

(A copy of this Section is appended to the appellant's brief, p. 63.)

THIRD.

The application for a writ of certiorari.

The present appeal was taken on September 23, 1919 (Record, p. 34). On October 6, 1919, the appellant applied to this Court for a writ of *certiorari* to review the order from which the appeal had been taken. The application was denied (250 U. S. 671). It could have been made only under Section 240 of the Judicial Code, upon the theory that no appeal would lie from the order of the Circuit Court of Appeals. The application thus plainly indicates that the appellant's counsel had no faith in the appeal taken.

FOURTH.

The general welfare argument.

Section 255 of the City Charter is cited by the appellant (Brief, pp. 40, 64) as authority for the Corporation Counsel to represent the City in every case where its rights, or the rights "of the people thereof" are involved; and the so-called Home Rule Bill is also cited (pp. 41, 53), to show the very broad powers conferred upon the cities of the State in the management of their general affairs.

I. Section 255 has reference to the property rights and interests of the municipality, in its corporate capacity; and the phrase, "the people thereof", refers to the collective rights of those who constitute the community, and not to the several individuals or persons in the community. The much abused word "people" is here employed in its proper sense, as signifying the entire body of citizens or the community as a whole; and it was not intended to make the "Corporation" Counsel the private counsel of all the inhabitants, to enforce their separate and individual rights. In his zeal to represent "the people", the learned Corporation Counsel overlooks the fact that the Public Service Commissions Law provides for the employment by each Commission of a general counsel, at a salary of $10,000 a year, with power to appoint additional attorneys and counselors as associates (Secs. 6, 12, 13): an unnecessary burden upon the taxpayers, if the duty rests upon the Corporation Counsel.

II. Counsel for the appellant answered their own argument as to the meaning of the word "people" in their original petition to intervene, in which they quote from the opinion of the New York Court of

Appeals, in Interborough Railway Co. *v.* Rann (Record, pp. 4-5):

> "As a legal conception, a community is an entity distinct from its inhabitants, but it remains a local community and body of persons, the sum total of its inhabitants and the proper custodian and guardian *of their collective rights.*"

III. The so-called Home Rule Bill is applicable to all the cities of the State, and not merely to New York City. No power is conferred upon municipalities by that Act, which in any way conflicts with the regulatory powers specifically conferred upon the Public Service Commission. The argument of counsel on this point would lead to the conclusion that, in spite of the explicit provisions of the Public Service Commissions Law, all the cities of the State have coordinate control in the regulation of their public utilities.

IV. The right of the Attorney General to defend a statute which is attacked as unconstitutional is conferred by Section 68 of the Executive Law (appellant's brief, p. 63). Counsel for appellant argue that, as Section 68 is part of the general law and as Section 255 of the City Charter is part of a local statute, the former must yield to the latter; and they "assert in all confidence" (Brief, p. 28), "that the general state law must yield to the special local law."

If they had borne that principle in mind, they would have concluded that the general provisions of the City Charter, and the general State law known as the "Home Rule Bill", must yield to the specific provisions of the Public Service Commissions Law.

V. It is not only the Attorney General's right, under Section 68 of the Executive Law, to defend the statute, but it is his duty, under Section 1962

of the Code of Civil Procedure (appellant's brief, p. 64), to enforce the penalties incurred for a violation of the statute.

VI. It is inconceivable that the legislature intended, by the Public Service Commissions Law, to establish a dual system for the regulation of public utilities, one by the municipality and the other by the Commission. Dual regulation by two different bodies, with different views on the subject, would be altogether impossible. The Public Service Commissions Law, however, makes it entirely clear that nothing of the sort was intended, as Section 127 provides that "all other acts and parts of acts otherwise in conflict with this Act are hereby repealed."

VII. How completely the City is subordinated to the Commission is manifest throughout the Public Service Commissions Law (Sections 65, 66, 67, 68, 71, 74).

Thus, Section 71 provides that a complaint may be filed by the mayor of a city with the Commission, as to the quality, pressure or price of gas, and, thereupon, the Commission shall make an investigation of the facts. In other words, the power of the city is limited to bringing any case of the infraction of the law to the attention of the Commission.

The Act contemplates the possibility that municipalities in the State may themselves operate gas and electrical properties, and, in that connection, it places them in the same class as privately operated companies. They cannot, for instance, engage in such business at all, without first obtaining a certificate of public necessity and convenience (Sec. 68). If, with the permission of the Commission, they do operate gas or electrical properties, the Commission is required to see that they comply

with the law and with the orders of the Commission (Sec. 74). In other words, the legislature has not provided for a dual system of regulation, but has placed one body in supreme control of all the public utilities of the State, even to the extent of expressly placing the municipalities themselves under such control. The Court of Appeals has recognized that in the case of rates to be charged by a gas company, complete and exclusive jurisdiction has been conferred on the Commission, even where the rate was originally established by the municipality.

> People *ex rel.* S. Glens Falls *v.* Public Svce. Com., 225 N. Y. 216.

VIII. That the City, as such, has no duty and not even any right to represent the private consumers in a rate case, was expressly decided by the Appellate Division of the New York Supreme Court, in connection with the very statute which is the subject of the present litigation.

> Richman *v.* Consolidated Gas Co., 114 App. Div., 216.

In that case, the Court somewhat impatiently said (p. 224):

> "Of course, the City of New York does not represent the private consumers and it cannot appear for them in the litigation in a Federal Court."

In City of Mount Vernon v. New York Interurban Water Company (115 App. Div. 658), the Court said (p. 662):

> "So far as the action seeks a judicial scrutiny of the rates as unreasonable to the private consumers, I think it cannot be maintained. The municipal corporation has not such legal concern or interest in the relations of the company and the individual consumers as warrants the bringing of such a suit."

FIFTH.

The Public Service Commission, First District, is the representative of the City.

A municipal corporation is entirely the creature of the legislature; and its functions are such only as the legislature prescribes.

People *ex rel.* S. Glens Falls *v.* Public Svce. Com., 225 N. Y. 216, 223;

Pawhuska *v.* Pawhuska Oil Co., 250 U. S. 394, 399.

If the legislature delegates to the municipality the power to make rates for public utilities and to enforce such rates, the municipality is, of course, the proper party to any litigation in which the rates are involved; and this was the situation in every case cited by the appellant where the municipality was a party. But when a municipality expands into a great metropolis, the ordinary municipal agencies are unequal to the manifold duties resulting from the vest network of activities, and, as a consequence, the legislature creates numerous independent boards and commissions and turns over to them various duties and functions ordinarily delegated to the municipality. It was for this reason that, by the Public Service Commissions Law, the legislature divided the state into two districts, one coincident with the City of New York, known as the First District, and the other comprising the remainder of the State, known as the Second District (Sec. 3); and it appointed a separate Commission for each District.

The Commission for the First District is thus the actual and sole representative of the City in matters affecting the public utility corporations.

SIXTH.

A decisive test.

I. If the City of New York had been made a party defendant in the original bill of complaint, it is clear that it would have been entitled to a dismissal of the bill as to it, because no cause of action or ground for equitable relief against it is shown in the bill.

A suit of this kind, to restrain the enforcement of a statute, will lie only against those who have been charged by law with some special duty in connection with the statute.

> Fitts *v.* McGhee, 172 U. S. 516, 529:
> *Ex parte* Young, 209 U. S. 123, 156-8.

In *Ex parte* Young, this Court, distinguishing Fitts v. McGhee, said (p. 158):

> "The officers in the Fitts case occupied the position of having no duty at all with regard to the Act and *could not properly be made parties to the suit* for the reason stated.

The officers thus referred to were the Governor and the Attorney General of the State; but the Court held that, as no positive duty was laid upon them to enforce the statute, the mere fact that they were charged generally with the execution of all the laws of the State was not sufficient to enable the suit to be maintained against them; and in the Young case, referring to these officers, the Court said (p. 156):

> "A state superintendent of schools might as well have been made a party."

So, in the case at bar, if it were conceded, for the sake of the argument, that the City had a general interest in seeing that all the laws affecting its inhabitants were enforced, this would place no duty

upon it which would justify an action to restrain it from enforcing a particular statute.

II. The principle of the Fitts and Young cases was applied by this Court in *In re* Engelhard (231 U. S. 646), where the Court said (p. 651):

> "It is the universal practice, sustained by authority, that the only mode of judicial relief against unreasonable rates is by suit against the governmental authority which established them or is charged with the duty of enforcing them."

The rate in that case had been made by the municipality, and it had the duty of enforcing it.

III. As this Court recognized in the Young case (*supra*), there is no more propriety in making the City a party defendant than there would be in making the County of New York, or a school district, or any other public agency or instrumentality which happened to cover the same territory.

SEVENTH.

A needless alarm.

Counsel for the appellant express concern over the possible fate of the Act giving the City a seventy-five cent rate (L. 1905, Ch. 736), in case a decision should be rendered in this suit in favor of the complainant. That Act was attacked in the previous litigation (212 U. S. 19) as discriminatory; but this Court thought there was justification for the discrimination, in the fact that the City was a wholesale consumer; and it held that, so long as the Company derived an adequate return from

its entire business, the price to the City was immaterial; and as to this, the Court said (p. 54):

> "The only interest of the complainant in the question is to find out whether by the reduced price to the City, the complainant is, upon the whole, unable to realize a return sufficient to comply with what it has a right to demand * * *. So long as the total is enough to furnish such return, it is not important that, with relation to some consumers, the price is not enough."

As a result of that decision, no attack has been made upon the Seventy-five cent Act in the present suit; and the record affirmatively shows that no attack will be made upon it (Record, p. 18).

The City now argues, however (Brief, p. 42), that it should be made a party defendant, because an attack *may* be made on the seventy-five cent rate at some time in the future and a decree in the present case in favor of the complainant *might* be prejudicial to it. But if the Eighty-cent Act should be declared void, the Company will be free to fix a rate which will ensure it an adequate return from its private consumers, and if it obtains such a return, there will be no possible ground for an attack upon the rate to the City, as this Court expressly declared in the language above quoted.

EIGHTH.

Some comments on the appellant's brief.

I. The appellant's brief is not strictly confined to the record. Nine pages (67-75) are occupied with an alleged history of the complainant, said (p. 3) to have been extracted from Poor's Manual.

An assertion contained in the brief (p. 4) is based on something which is said to have appeared in an affidavit filed by the District Attorney in the lower court, in another proceeding and forming no part of the present record.

Statements are made (p. 19) of what the Public Service Commission has done in other cases, without any reference to any record or report where such statements might be found.

II. Carelessness of statement is seen in such assertions (p. 21) as that the question of the complainant's special franchises was left undecided in the previous litigation (212 U. S. 19). But the record in that case shows that the Circuit Court expressly held that the complainant did have perpetual franchises (157 Fed. 849, 880); and this Court allowed the complainant to include in its property, upon which it was entitled to earn a return, the sum of $7,781,000, representing the amount at which the special franchises had been capitalized in 1884 (212 U. S. 19, 46-47).

III. Counsel reproach the Public Service Commission because it endeavors to act with some degree of consistency and some regard to its official decisions. Thus, they say (p. 19):

> "That body feels more or less bound by the decisions which it renders. Thus, when matters of appraisals or valuations come up, the

> Commission feels that it is limited and restricted by the findings made by the same body at some earlier period"!

Counsel evidently have no respect for the honored doctrine of *stare decisis.*

IV. In arguing that the City has a right to protect the interests of its citizens, counsel overlook the fact that the Public Service Commission for the First District (that is, for the City of New York) is just as much a part of the machinery of the municipality for the protection of its citizens as is the Corporation Counsel himself.

V. In the petition to intervene (Record, pp. 2-9), as well as throughout the appellant's brief, it is made perfectly clear that the sole object which the City has in view in intervening in this cause is to oppose in every possible way the attack which the complainant has made upon the statute limiting the price of gas to eighty cents.

This attitude of the City is said by counsel (Brief, p. 32) to be in complete harmony and conformity with the requirement of Equity Rule 37 of this Court, that "the intervention shall be in subordination to and in recognition of the propriety of the main proceeding." In other words, the City subordinates itself to the claim made by the complainant, by opposing it and seeking to defeat it; and it recognizes the propriety of the position taken in the bill of complaint, by endeavoring to show that this position has no merit, is entirely unfounded and should not be sustained!

VI. *Authorities relied upon.*

In all the cases cited by the appellant as authority for the proposition that a municipal corporation is a proper party, the power and duty of regulation were conferred upon the municipality.

In not one of them had this power been conferred upon a separate commission.

VII. Provisions of the New York Constitution are set forth at great length (Brief, pp. 50-1), to show that local bills affecting cities of the first class must be submitted to the mayor for approval; and because the Eighty-cent Act was thus approved, the question is triumphantly asked (p. 10):

> "Then does it not follow that the City is both a necessary and proper party in an action to have this Act declared invalid?"

VIII. The climax of the appellant's argument is reached in the last point (p. 45), where it is gravely suggested that when the District Court denied the application of the City for leave to intervene, it deprived the City of its property without due process of law, in disregard of its constitutional rights!

IX. The municipal authorities evidently fail to see why anyone should object to their injecting themselves into this litigation. But the bill of complaint shows (Record, p. 14) that the daily average loss of the complainant from its gas business, below a return of only six per cent. upon its investment, is about $14,000; and this Court has recently announced that even a six per cent. return, under existing conditions, is not necessarily adequate.

Lincoln Gas Co. *v.* Lincoln, 250 U. S. 256.

In the affidavit made on the complainant's motion to dismiss the pending appeal, it is shown that the zeal of the Corporation Counsel, as solicitor for the District Attorney in the conduct of this litigation, has led him to consume much more of the time of the Court than the counsel for the Commission and the Attorney General put together

(pp. 15-16). The inevitable result has been what the Court saw was likely to happen, in Gregory *v.* Pike (67 Fed. 837), where the Court said:

> "Complainants should not be compelled into litigation with parties not of their own seeking. One may commence a proceeding very simple in its nature and be content to take the risk of it; but if other persons can force themselves into the litigation, what he conceives to be simple may become complicated, expensive and interminable."

NINTH.

The appeal should be dismissed, or the order appealed from should be affirmed.

WASHINGTON, April 12, 1920.

JOHN A. GARVER,
Counsel for Appellee

No. 566

Supreme Court of the United States.

CONSOLIDATED GAS COMPANY OF NEW YORK,
Complainant-Appellee,

against

CHARLES D. NEWTON, as Attorney General of the State of New York, EDWARD SWANN, as District Attorney of the County of New York, State of New York, and LEWIS NIXON, constituting the Public Service Commission of the State of New York, First District,
Defendants,

THE CITY OF NEW YORK,
Appellant.

Brief of the City of New York in Answer to Appellee's Brief to Dismiss.

JOHN P. O'BRIEN,
Corporation Counsel.

Stillman Appellate Printing Company, 200 William Street, N. Y. C.

Supreme Court of the United States.

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Defendants,

THE CITY OF NEW YORK,
Appellant.

BRIEF OF THE CITY OF NEW YORK IN ANSWER TO APPELLEE'S BRIEF TO DISMISS.

ANSWER TO POINT MARKED "FIRST."

I. The order appealed from is a final order.

The making of this final order was a determination or adjudication of a substantial right against

the appellant in such manner as to leave it no adequate relief except by recourse to an appeal.

Gay vs. Hudson River El. Co., 184 Fed., 689;
Matter of Farmers' L. & T. Co., 129 U. S., 206;
Brush Electric Co. vs. Electric Imp. Co., 51 Fed., 557, 561.

The right of the City to represent its inhabitants and also its right to represent its own interest through its Corporation Counsel, is a substantial and constitutional right entitled to the protection of the Courts. The order appealed from impaired this substantial right of the City and, therefore, it is a final order.

Central Trust Co. of N. Y. vs. Chicago R. I. & P. R. R. Co., 218 Fed., 336;
Odell vs. Batterman, 223 Fed., 292;
Gas & Electric Securities Co. vs. Manhattan & Queens Traction Corporation, decided by the Circuit Court of Appeals for the Second Circuit, Feb. 24, 1920;
(A copy of which opinion is submitted herewith.)

II. The cases mentioned by appellee on page 5 of its Brief are not in point.

Ex parte Cutting was an application for a writ of mandamus commanding the judges of the Circuit Court to allow petitioner an appeal from the

decree in the cause and a *supersedeas*. No appeal was asked of the Circuit Court as a party to the suit. The petitioner sought only to become a party to the appeal. Mr. Chief Justice WAITE said:

> "They filed their petition to be made defendants in the suit, but it was never granted. Not only was no express order made to that effect, but there is nothing to show that they were ever in any manner recognized as parties, or that they ever supposed they were parties" (94 U. S., 14, 20).

In *Credits Commutation Co. vs. United States*, the petitioner's right was, in the language of the Court, " * * * nothing more than a contingent, speculative, future possibility."

Ex parte Leaf Tobacco Board of Trade was a case where the petitioners, instead of appealing from the order refusing to allow petitioner to become a party defendant, sought by mandamus to have the judgment in the case reviewed and the Court held that "one who is not a party to the record and judgment is not entitled to appeal therefrom."

III. The instant case is in no way analogous to the foregoing.

The consumers are not represented either in their collective or in their individual capacity in the present case, nor is The City of New York, who is the greatest single consumer of appellee, represented. The interest of The City of New York is a substan-

tial interest and not a mere contingent, speculative and future possibility as was the interest of the petitioner in the Credits Commutation Company case, *supra*. The City has a real, substantial interest and right to defend itself and also to defend its inhabitants who are consumers in their collective capacity. The order refusing the City the right to become a party affects a substantial constitutional right of The City of New York and the people of The City of New York who are consumers of appellee and, therefore, the order is a final order and appealable.

As late as the year 1916 the Legislature of the State amended Chapter 125 of the Laws of 1906 by Chapter 604 of the Laws of 1916, which act was under the Constitution accepted by the City and this shows how directly and immediately the acts in question affected the "affairs" of The City of New York (see Appendix).

There is also submitted herewith a copy of an opinion by Justice Samuel Greenbaum in *Jamaica Gas Light Co. vs. Nixon*, wherein he holds, under Section 452 of the Code of Civil Procedure, which is substantially the same as Rule 37 of the Federal Equity Rules, that The City of New York is both a necessary and proper party to a suit brought in the State Court for a decree declaring unconstitutional the acts in question. This decision is authority that The City of New York is a proper party for a complete determination of an action brought to test the constitutionality of a statute fixing a rate for gas.

ANSWER TO POINT "SECOND."

I. In representing the District Attorney the Corporation Counsel was not representing The City of New York. The District Attorney is a county officer. Nor can such representation be construed as an appearance for the People of The City of New York in their collective capacity. The City has the authority to appropriate money for the expenses of The City of New York and its inhabitants. Such authority, however, does not extend to the appropriation of moneys to support the defense of a *county officer* such as the District Attorney. The present suit resolved itself into a battle of experts, and owing to the fact that The City of New York was not a party, the Corporation Counsel was unable to obtain the money necessary to procure valuable expert testimony which was essential to a thorough defense of this suit. Moreover, the Corporation Counsel, owing to the fact that the City was not a party and to the lack of funds due to that fact, was unable to have such experts as he could procure spend sufficient time in an examination of the books and properties of the complainant which was so necessary to a proper presentation of the defense of this suit.

II. Moreover, the District Attorney may not authorize an appeal from the judgment entered herein if the same be against the constitutionality of the act involved, for the reason that according to recent authorities, both of the Supreme Court of the United States and of the State of New York, penalties may not be enforcible during the time the

constitutionality of a rate statute is in litigation. This was pointed out in a very learned decision of the Appellate Division of the Supreme Court of the State of New York in *Bronx Gas and Electric Company, Appellant, vs. Public Service Commission of the State of New York, First District.*

180 N. Y. Supp., 38.

There is also the question whether the State of New York will appropriate further money for the appeal from any decree entered in the present case and also whether the Attorney General will have sufficient funds to carry on such an appeal. There is nothing in the Public Service Commissions Law which directs the Public Service Commission to appeal from any judgment that may be entered in this case, and it is questionable whether under the law it is the duty of the Public Service Commission to appeal to the Supreme Court of the United States if the decree be against the constitutionality of the law.

It, therefore, appears that the interests of The City of New York and of its inhabitants have not been and may not in the future be represented and protected in this litigation.

The quotation from the case of *Richman vs. Consolidated Gas Co.*, 114 App. Div., 216, in appellee's brief (p. 8) to the effect that The City of New York does not represent private consumers, is not in point here for the reason that in the original Consolidated Gas Company of New York litigation The City of New York was made a party because complainant attacked the constitutionality of Chapter 736 of the Laws of 1905, which provided for a rate

of 75 cents per 1,000 cubic feet for gas supplied to the City, and The City of New York did not expressly undertake in that litigation to represent the consumers who were the inhabitants of the City.

ANSWER TO "FOURTH" POINT.

I. The constitutionality of the Eighty Cent Act (Chapter 125 of the Laws of 1906) necessarily involves the constitutionality of the Seventy Five Cent Act (Chapter 736 of the Laws of 1905). If the former should be declared unconstitutional, then the company might fix a rate of $1.50 or $2.00 a thousand cubic feet and the private consumers would then have the right to claim that they were discriminated against in favor of the City. Thus, the present litigation necessarily involves the constitutionality of Chapter 736 of the Laws of 1905.

II. The fact that the appellee states that it had no intention of attacking the Seventy Five Cent Act, cannot prevent the consumers from setting up and claiming that the Seventy Five Cent Rate in favor of the City is discriminatory as against them and that therefore it is unconstitutional. The fact that the validity of the Seventy Five Cent rate was established in the previous litigation (212 U. S., 19, 54) cannot affect the discriminatory character of the Seventy Five Cent rate so far as the present litigation is concerned. The 500,000 individual consumers of the company certainly have an interest in this litigation and they expect the City of New York, through its Cor-

poration Counsel, to defend that interest, and for this reason we find not a single consumer or civic body has made any attempt to become a party to this litigation.

Actions have also been brought by the following gas companies operating within The City of New York to have declared unconstitutional said Chapter 125 of the Laws of 1906, to wit:

1. East River Gas Company of Long Island City.

2. The New York Mutual Gas Light Company.

3. Northern Union Gas Company.

4. Central Union Gas Company.

5. The Standard Gas Light Company of The City of New York.

6. New Amsterdam Gas Company.

7. Brooklyn Union Gas Company.

8. New York and Queens Gas Company.

9. Newtown Gas Company vs. Nixon and others.

10. Woodhaven Gas Light Company vs. Nixon and others.

The City of New York has not been made a party to any of these suits and the actual trials thereof have not yet been commenced.

It is my purpose as Corporation Counsel of the City of New York to make a motion in each of said

suits in the District Court of the United States for the Southern District of New York in which district said suits are now pending for an order of said Court permitting The City of New York to be made a party defendant therein similar to the motion made in the above entitled case which was denied by Judge Julius M. Mayer, District Judge of the Southern District of New York, and which order was confirmed by the Circuit Court of Appeals for the Second Circuit and from which said order of confirmation the above entitled appeal was taken.

In fact in the Brooklyn Union Gas Company case I have already made such a motion and it has been denied and I have taken an appeal directly to this Court from the final order denying my petition to become a party in that case.

The fact that the present suit is finished is unimportant for the reason that the *City should be a party on the record on appeal.*

Moreover, the right of the City and its inhabitants to be represented as parties in the above ten cases depends on the outcome of this appeal.

The questions therefore involved in this appeal are neither abstract, hypothetical or moot, and are closely connected with the granting of actual relief both to the City of New York and its inhabitants who are consumers of the appellee and both to the City and to such consumers practical relief will follow the determination of this appeal in their favor. There is a legal, substantial right both of the City and of its inhabitants to be decided in this appeal.

It is respectfully submitted that the final order of the District Court as affirmed by the Circuit Court of Appeals should be reversed.

Dated April 17, 1920.

JOHN P. O'BRIEN,
Corporation Counsel.

VINCENT VICTORY,
Of Counsel.

APPENDIX.

"CHAP. 604.

AN ACT to amend chapter one hundred and twenty-five of the laws of nineteen hundred and six, entitled "An act in relation to illuminating gas in the city of New York and regulating the quality and pressure thereof and the price to consumers other than said city and providing a penalty for violation," in relation to price of gas to consumers in such city.

Became a law May 18, 1916, with the approval of the Governor. Passed, three-fifths being present.

Accepted by the City.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Subdivisions one, two and three of section one of chapter one hundred and twenty-five of the laws of nineteen hundred and six, entitled "An act in relation to illuminating gas in the city of New York and regulating the quality and pressure thereof and the price to consumers other than said city and providing a penalty for violation," are hereby amended to read, respectively, as follows:

1. In the borough of Manhattan, in the first ward of the borough of Queens, in the borough of Brook-

lyn and in the borough of the Bronx, except that portion of it formerly contained in the town of Westchester outside of the villages of Wakefield and Williamsbridge, eighty cents.

2. In the second, third and fourth wards of the borough of Queens, and the borough of Richmond, one dollar.

§2. This act shall take effect July first, nineteen hundred and sixteen."

Supreme Court of the United States,

OCTOBER TERM, 1919.

No. 943.

CONSOLIDATED GAS COMPANY OF NEW YORK,
Complainant-Appellee,

AGAINST

CHARLES D. NEWTON, as Attorney General for the State of New York, EDWARD SWANN, as District Attorney of the County of New York, and LEWIS NIXON, Constituting the Public Service Commission of the State of New York, First District,
Defendants (not appealing),

THE CITY OF NEW YORK,
Appellant.

Notice of motion to dismiss appeal.

TAKE NOTICE, that, on April 12, 1920, at 12 o'clock noon or as soon thereafter as counsel can be heard, in the Supreme Court Room, Washington, D. C., the Complainant-Appellee above named, will move this Court on the record and on all the proceedings had herein and on the annexed affidavit of Charles A. Vilas, verified March 20, 1920, and accompanying brief to dismiss the above entitled appeal, on the following grounds:

I. For want of jurisdiction in this Court to determine the same, in that the order ap-

pealed from, which affirmed an order denying the appellant's petition for leave to intervene as a party defendant in the above entitled cause, was not a final order and, therefore, is not subject to review.

II. For want of jurisdiction in this Court, in that the appellant, having no property or other legal interest in the said cause giving it a legal right to intervene as a necessary party thereto, the order of the District Court of the United States for the Southern District of New York, which denied the appellant's petition for leave to intervene, and which was affirmed by the order appealed from, was discretionary and therefore is not subject to review.

III. That it is manifest that the appeal from the said order is taken only for delay, and that the questions on which the appellant bases the said appeal are so frivolous as to require no further argument.

IV. That the questions involved in this appeal have become academic and moot, because the trial of the cause in which the appellant sought to intervene has been concluded, and the appellant, though not a formal party to the said cause, was fully and adequately represented at the said trial, and its rights and interests, if any, in the said cause, were duly protected.

New York, March 20, 1920.

JOHN A. GARVER,
Counsel for Appellee,
55 Wall Street,
New York.

To

WILLIAM P. BURR, Esq.,
Corporation Counsel of the City of New York
and Solicitor for Appellant.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1919.

No. 943.

CONSOLIDATED GAS COMPANY OF NEW YORK,
Complainant-Appellee,

AGAINST

CHARLES D. NEWTON, as Attorney General for the State of New York, EDWARD SWANN, as District Attorney of the County of New York, and LEWIS NIXON, Constituting the Public Service Commission of the State of New York, First District,
Defendants (not appealing),

THE CITY OF NEW YORK,
Appellant.

BRIEF FOR COMPLAINANT-APPELLEE IN SUPPORT OF MOTION TO DISMISS.

Motion by the complainant-appellee to dismiss an appeal from an order of the Circuit Court of Appeals, Second Circuit, unanimously affirming an order of the District Court which denied the petition of the City of New York for leave to intervene as a party defendant in the above entitled cause.

On October 6, 1919, the City applied to this Court for a writ of *certiorari* to review the said order from

which the said appeal had previously been taken. The application was denied by this Court on October 20, 1919 (250 U. S., 671).

The suit was brought by the complainant, the Consolidated Gas Company of New York, to have the so-called "Eighty-cent Gas Act" of New York (L. 1906. Chap. 125), which limits the price of gas to be charged to private consumers in the City of New York to eighty cents per thousand cubic feet, declared void, on the ground that the rate is confiscatory and therefore deprives the complainant of its property without due process of law.

POINTS.

FIRST.

The order appealed from is not subject to review.

I. No decision of this Court has been found, in which an order of a lower court denying a petition to intervene in an action pending in such court has been held to be reviewable. A case of this kind is to be distinguished from the cases in which an outside party has been permitted to intervene and has filed a claim to property in the custody of the Court and the claim has been denied on the merits. An order denying such a claim is, of course, a final order, disposing absolutely of property rights of the claimant and is, therefore, appealable. This is quite different, however, from the question whether an outsider shall be permitted to intervene and become a party to an action, when such intervention is objected to by some or all of the existing parties. This Court has always held that question to be within the discretion of the trial court and not subject to review.

Ex parte Cutting, 94 U. S., 14, 22;
Credits Commutation Co. *v.* U. S., 177 U. S., 311, 315;
Ex parte Leaf Tobacco Board of Trade, 222 U. S., 578, 581;
In re Engelhard, 231 U. S., 646.

II. Although the District Court in this case stated that it denied the petition as a matter of law and not of discretion (Record, p. 29), this statement is not controlling, if the petition to intervene

was necessarily addressed to the discretion of the court; because, the petitioner failed to show that it had a legal right to intervene or that it had any property interest involved in the litigation. Practically the same situation was presented in Credits Commutation Co. v. United States (*supra*). There, the order of the Circuit Court stated that the prayers for leave to intervene were denied, "not as matter of discretion, but because said petitions do not state facts sufficient to show that the petitioners, or either of them, have a legal right to intervene". Appeals were taken to the Circuit Court of Appeals, which granted motions to dismiss the appeals. Thereupon, appeals were allowed to this Court, which were also dismissed. In its opinion, this Court quoted from the opinion of the Circuit Court of Appeals, as follows (pp. 315-316):

> "When such an action is taken, that is to say, when leave to intevene in an equity case is asked and refused, the rule, so far as we are aware, is well settled, that the order thus made denying leave to intervene is not regarded as a final determination of the merits of the claim on which the intervention is based, but leaves the petitioner at full liberty to assert his rights in any other appropriate form of proceeding. Such an order not only lacks the finality which is necessary to support an appeal, but it is usually said of it that it cannot be reviewed, because it merely involves an exercise of the discretionary powers of the trial court. * * * It is doubtless true that cases may arise where the denial of a third party to intervene therein would be a practical denial of certain relief to which the intervenor is fairly entitled, and which he can only obtain by an intervention. Cases of this sort are those where there is a fund in court undergoing administration, to which a third party asserts some right which will be lost in the event that he is not allowed

to intervene before the fund is dissipated. In such cases, an order denying leave to intervene is not discretionary with the chancellor, and will generally furnish the basis for an appeal, since it finally disposes of the intervenor's claim by denying him all right to relief."

III. The present case, of course, bears no similarity to the cases referred to, in which the petitioner claims an interest in some fund or property which is to be disposed of in the action and in which he would be deprived of all opportunity of asserting his rights were he not permitted to intervene.

SECOND.

The City already represented in the litigation, and the question involved in the appeal academic.

That there is no substantial merit in this appeal and that its purpose is to delay the complainant in obtaining the relief to which it is entitled, is shown by the fact that the City has been represented in the litigation and has taken part therein to the same extent that would have been possible for it to do had its petition for leave to become a formal party been granted (affidavit, *post*, p. 15).

After the District Court had denied the application of the City to intervene, the Corporation Counsel of the City, in his official capacity, was substituted as solicitor for Mr. Swann, the District Attorney. A motion by the complainant, to set aside the order of substitution, was denied, on the ground, asserted by the City, that the Corporation

Counsel had undoubted power to appear for the District Attorney. Extracts from the affidavit of the Corporation Counsel, claiming this right, are given in the annexed affidavit (*post*, pp. 14-15); which also shows that during the entire trial, the City, through its Corporation Counsel, was continuously active in taking a prominent part in the defense, not only in the cross-examination of the complainant's witnesses, but also in employing accountants, engineers and expert witnesses of its own. The question of the right of the City to intervene has therefore become academic.

The trial before the Special Master, which continued almost uninterruptedly for nearly eight months, and the record of which comprises more than 14,000 pages, exclusive of about 900 exhibits, was concluded on March 5, 1920; and it is expected that the Master's report will be filed and a decree entered very shortly (affidavit, *post*, p. 15). Great hardship to the complainant would thus result by postponing for an indefinite period the relief to which it is entitled, merely for the purpose of permitting the City to become a nominal party to the litigation, when it has been an actual party throughout the trial.

THIRD.

The public interest already completely represented and protected.

The City is neither a necessary nor a proper party to this suit, because all parties charged with the duty of upholding the Eighty-cent Act (L.

1906, Ch. 125), which is attacked in this litigation, are already before the Court: the Public Service Commission, the Attorney General and the District Attorney of New York County.

I. There are two Public Service Commissions in the State of New York: one for the First District, comprising the City of New York, and the other for the remainder of the State. Absolute power of regulation and enforcement of the law is conferred upon the Commission (L. 1907, Ch. 429, as amended).

The Commission is, therefore, the sole body charged with the duty of representing the consumers in the City of New York.

In re Engelhard, 231 U. S., 646.

II. The Attorney General is required by law to appear in all cases involving the constitutionality of an act of the legislature; and the Eighty-cent Act is assailed on the ground that it is unconstitutional.

Executive Law, Sec. 68.

III. The District Attorney of the County in which a suit is triable is charged with the duty of enforcing the penalties prescribed by the statute.

Code Civ. Pro., Sec. 1962.

IV. All of the said officials are parties defendant herein and have taken an active part in the defense of this suit (affidavit, *post*, pp. 15-16).

V. Extracts from the New York Statutes referred to herein are printed in the main brief to be submitted on behalf of the appellee on the argument of this appeal.

FOURTH.

Frivolous character of the appeal.

If the City was not a necessary party to this litigation, that is, if the order denying its application to intervene did not deprive it absolutely of a right which it could not otherwise protect, the order was not final and, therefore is not appealable. The only pretense of such a right is that, under an entirely distinct statute (L. 1905, Ch. 736), the price of gas to the City is limited to seventy-five cents, and that if the Eighty-cent Act in favor of the private consumers should be declared void, that statute may be attacked by the Company some time in the future and the City may be prejudiced in maintaining it.

1. The record on appeal expressly shows that the Company has no intention of attacking the Seventy-five-cent Act (Record, p. 18). Moreover, the validity of that Act was determined by this Court in the previous litigation, in which the City was made a party for the reason that the validity of that Act was then assailed.

> Willcox *v.* Consolidated Gas Co., 212 U. S., 19, 54.

A decision in the present case in favor of the Gas Company, which would enable it to establish a rate to its private consumers permitting an adequate return on its entire investment, would make it absolutely impossible for the Company, under the previous decision of this Court (212 U. S., 54), to question the seventy-five-cent rate.

The contention of the City has not even the basis of the personal interest which might prompt any one of the 500,000 individual consumers of the Company (Record, p. 15) to intervene.

II. If the City was not a *necessary* party to the litigation (which is not pretended), then even if it were a *proper* party, its application to intervene was within the discretion of the District Court; and its decision will not be reviewed by this Court, even if the lower court treated the question as one of right and not of discretion.

Credits Commutation Co. *v.* U. S., 177 U. S., 311, 315.

FIFTH.

The appeal should be dismissed.

March 20, 1920.

JOHN A. GARVER,
Counsel for appellee.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1919.

No. 943.

CONSOLIDATED GAS COMPANY OF NEW YORK,
Complainant-Appellee,

AGAINST

CHARLES D. NEWTON, as Attorney General for the State of New York, EDWARD SWANN, as District Attorney of the County of New York, and LEWIS NIXON, Constituting the Public Service Commission of the State of New York, First District,
Defendants (not appealing),

THE CITY OF NEW YORK,
Appellant.

Affidavit of Charles A. Vilas.

STATE OF NEW YORK,
County of New York.

CHARLES A. VILAS, being duly sworn, says:

1. I am an attorney at law, associated with the firm of Shearman and Sterling, solicitors for the Complainant-Apellee herein, and am familiar with all the proceedings which have been had in this suit.

2. This appeal is from an order of the Circuit Court of Appeals for the Second Circuit, entered July 19, 1919, affirming an order of the District Court of the United States for the Southern Dis-

trict of New York, dated March 3, 1919, which denied the petition of the appellant for leave to intervene in this cause as a party defendant. The appeal to this Court was taken on September 23, 1919. A petition for a writ of *certiorari* to review the said order of the Circuit Court of Appeals was also filed by the appellant, on October 6, 1919, and was denied by this Court on October 20, 1919. On February 20, 1920, the appellant made a motion to advance the argument of the appeal, upon which this Court set down the appeal for argument on April 12, 1920, the same date on which this motion is made returnable.

3. This suit, which was commenced on January 16, 1919, is brought by the complainant, Consolidated Gas Company of New York, for the purpose of having declared void the so-called "Eighty-cent Gas Law" of New York (L. 1906, Chap. 125), which limits the price of gas to be charged to private consumers in the City of New York to eighty cents per thousand cubic feet, on the ground that the rate is confiscatory and therefore deprives the complainant of its property without due process of law. The Public Serice Commission of the State of New York, First District, the Attorney General of the State of New York, and the District Attorney for the County of New York, were made parties defendant.

4. After the petition of the City of New York for leave to intervene as a party defendant in the said suit had been denied by the District Court on March 3, 1919, the Corporation Counsel of the said City was substituted, as such, as solicitor for the defendant, Edward Swann, District Attorney for the County of New York, by an order of substitution

dated May 15, 1919. The complainant moved to vacate the substitution; but, upon the Corporation Counsel's affidavit that it was his duty, as attorney and counsel for the City of New York, to appear for the District Attorney, the motion was denied on June 6, 1919; and the Corporation Counsel has ever since continued to act as solicitor for the defendant, Swann, in this suit.

The following extracts from an affidavit made by Mr. William P. Burr, the Corporation Counsel of the City of New York in 1919, in opposition to the complainant's motion to vacate his substitution as solicitor for the District Attorney, shows that the real purpose of the substitution was to permit the City, although held by the Court not to be a proper party, to defend the action as fully as it it were a party:

> "Deponent alleges that the responsibility of defending said action and appearing in behalf of said District Attorney herein is within his duty as attorney and counsel for The City of New York, its officers and agents, and the officers of the counties embraced in said City."
>
> * * * * *
>
> "That under the direction of your deponent, a large number of cases affected the rates at which various public services are performed in The City of New York have been conducted by the office of the Corporation Counsel before the Public Service Commission of the First District and before the Supreme Court of the State of New York in the counties of Kings, Queens, New York and of the Bronx. Prominent among these cases are those affecting the rates of the Newtown Gas Company, the Woodhaven Gas Company, the Brooklyn Borough Gas Company, The Bronx Gas and Electric Company and the Kings County Lighting Company. That by reason of the connection

of the said Corporation Counsel's office with these cases, deponent has trained a number of experts who are very proficient in this branch of litigation. The services of these men are available in the conduct of the case at bar without expense to the taxpayers other than the regular compensation of said City employees. That, moreover, the office of the Commissioner of Accounts, which is an office provided by the Greater New York Charter, is available to your deponent for the purpose of making investigations as to the accounts of the complainant and as to its operating expenses."

5. The trial of this suit was commenced before the Special Master on July 22, 1919, and proceded almost continuously thereafter until March 4, 1920, when it was concluded. The Special Master has appointed March 22, 1920, as the date on which he will hear final arguments; and it is expected that he will file his report and that a decree will be entered shortly thereafter. The record of the trial is exceedingly voluminous and comprises more than 14,000 pages, exclusive of 900 exhibits, many of them of great length.

6. During the entire trial, the Corporation Counsel has been represented at every session by Mr. John P. O'Brien, one of the Assistant Corporation Counsel, who has appeared for the City in all recent rate cases to which it has been a party. Mr. O'Brien has taken a very active, and the most prominent, part in the defense of the suit, has cross-examined the witnesses for the complainant at great length, and has examined most of the witnesses called for the defense. The City of New York has also employed accountants, engineers and expert statisticians, who have assisted the Corpo-

ration Counsel in connection with the defense and have appeared as witnesses. Mr. Terence Farley, the solicitor for the defendant, Lewis Nixon, constituting the Public Service Commission for the First District, who is the defendant most vitally interested in the suit, since he is the public officer charged by law with the duty of enforcing the provisions of the statutes under attack, has consumed probably not more than one-third as much of the time of the Court as has Mr. O'Brien; and this is also true of the Attorney General.

CHARLES A. VILAS.

Sworn to before me,
March 20, 1920.
ARTHUR C. POWER
Notary Public, Kings County
County Clerks No. 197 Registers No. 1122
Cert. Filed in N. Y. Co. Clerks No. 329 Reg. No. 1351
Bronx Co. Clerk's No. 19 Reg. 2150
Term Expires March 30, 1921.

No. 566

Supreme Court of the United States

OCTOBER TERM, 1919.

CONSOLIDATED GAS COMPANY OF NEW YORK,
Complainant-Appellee,

—against—

CHARLES D. NEWTON, as Attorney General of the State of New York; EDWARD SWANN, as District Attorney of the County of New York, State of New York, and LEWIS NIXON, constituting the Public Service Commission of the State of New York, First District,
Defendants,

THE CITY OF NEW YORK,
Appellant.

Notice and Petition to Advance Case

WILLIAM P. BURR,
Corporation Counsel of
The City of New York and
Solicitor for Appellant,
Municipal Building,
City of New York.

(17995) THE LEWIS PRINT, 8-12 READE ST., NEW YORK

Supreme Court of the United States

OCTOBER TERM, 1919.

CONSOLIDATED GAS COMPANY OF NEW YORK, Complainant-Appellee, *—against—* CHARLES D. NEWTON, as Attorney General of the State of New York; EDWARD SWANN, as District Attorney of the County of New York, State of New York, and LEWIS NIXON, constituting the Public Service Commission of the State of New York, First District, Defendants, THE CITY OF NEW YORK, Appellant.	Cal. No. 566.

Sirs:

Please take notice that on the petition of William P. Burr, Corporation Counsel of The City of New York, verified the 12th day of January, 1920, a copy of which is hereto attached, and upon all the papers and proceedings herein, I will move before the Supreme Court of the United States at Washington, D. C., pursuant to Rule 26 of the Rules of the Supreme Court of the United States, on Monday, the 19th day of January, 1920, at 12 o'clock noon, at the opening of said court for

motions, or as soon thereafter as counsel can be heard, for an order advancing the above entitled appeal on the docket of said court for argument to the first Monday of February, 1920, or to such earlier particular day as to the said Court may seem just and proper.

Dated, New York, January 12th, 1920.

Yours, etc.,
WILLIAM P. BURR,
Corporation Counsel and
Solicitor for Appellant,
Municipal Building,
Borough of Manhattan,
City of New York.

To:

SHEARMAN AND STERLING, Esqs.,
Solicitors for respondent Consolidated
Gas Company of New York,
55 Wall Street,
Borough of Manhattan,
City of New York.

CHARLES D. NEWTON, Esq.,
Attorney General of the State of New York,
57 Chambers Street,
Borough of Manhattan,
City of New York,

EDWARD SWANN, Esq.,
District Attorney for the County of New York.

TERENCE FARLEY, Esq.,
Solicitor for respondent, Lewis Nixon, constituting the Public Service Commission for the First District.

Supreme Court of the United States

OCTOBER TERM, 1919.

CONSOLIDATED GAS COMPANY OF NEW YORK, Complainant-Appellee, —*against*— CHARLES D. NEWTON, as Attorney General of the State of New York; EDWARD SWANN, as District Attorney of the County of New York, State of New York, and LEWIS NIXON, constituting the Public Service Commission of the State of New York, First District, Defendants, THE CITY OF NEW YORK, Appellant.	Cal. No. 566.

To the Honorable Supreme Court of the United States:

The petition of William P. Burr, Corporation Counsel of The City of New York, respectfully shows to this Court on information and belief:

I. This is a petition made in support of a motion to advance on the docket of this Honorable Court the above entitled appeal pursuant to Rule 26, Subdivisions 6 and 7 of the rules of the Supreme Court of the United States.

II. The above entitled appeal was brought by The City of New York to review an order of the Circuit Court of Appeals dated July 7, 1919, and filed and entered July 18, 1919, affirming an order of the District Court of the United States for the Southern District of New York, dated March 3, 1919, denying as matter of law an application of The City of New York for leave to intervene as a party defendant in the above entitled action commenced on January 16, 1919, in the said District Court of the United States for the Southern District of New York, and brought to have declared unconstitutional Chapter 125 of the Laws of the State of New York of 1906, providing a rate for gas sold to private consumers of 80c. per 1,000 cubic feet within certain portions of The City of New York because in contravention of the 14th Amendment of the Constitution of the United States and Section 10, Article I, thereof.

III. The relief prayed for in the bill of complaint in this action specifically reads as follows:

> "1. That it be adjudged and decreed that said Chapter 125 of the Laws of 1906 is illegal and void, because in contravention of Section 10 of Article I and the Fourteenth Amendment of the Constitution of the United States, as aforesaid.
>
> 2. That it be adjudged and decreed that your orator has no adequate remedy at law for the injury which will result from the further enforcement of said Act and that such injury will be irreparable.

3. That it be adjudged and decreed that your orator be granted a writ of permanent injunction issuing out of and under the seal of this Honorable Court, against the defendants, restraining them and each of them and each of their officers, agents, servants and employees and any and every person acting under and by virtue of the authority of said Act, from in any way enforcing or attempting to enforce the provisions of said Act of 1906 against your orator, or from bringing any actions thereunder to enforce the said penalties against your orator, or from bringing any actions in mandamus or for an injunction in any court whatsoever, for the purpose of compelling compliance by your orator with said Act."

IV. Chapter 125 of the Laws of 1906, the constitutionality of which was questioned by this suit, related solely to the affairs and government of the City of New York and was accepted by said City, under the provisions of Article XII, Section 2, of the State Constitution.

V. The City of New York was not made a party to this suit. The price of gas supplied to The City of New York was and now is fixed at 75 cents per thousand cubic feet by another act, which applies exclusively to The City of New York, to wit: Chapter 736 of the Laws of 1905.

VI. Charles D. Newton, as Attorney General of the State of New York, was made a party and considered a party necessary to a complete determination of this cause for the reason that, by virtue of Section 1962 of the Code of Civil Procedure it

is within the power and it is the duty of the Attorney General to set in motion proceedings for the recovery of the penalties prescribed by the said statute whenever an attempt is made to charge more than the letter of the statute permits, and, under Section 68 of the Executive Law, the Attorney General is the officer charged, under the procedure there set forth, with the duty of defending the constitutionality of statutes. For these reasons he is a necessary party-defendant, and the determination would not be complete without his presence.

Edward Swann, as District Attorney of the County of New York, was made a party for the reason that he is also an officer charged under said Section 1962 of the Code of Civil Procedure with the power and duty of bringing an action to recover the penalties provided by said Chapter 125 of the Laws of 1906.

The provision of said Chapter 125 of the Laws of 1906 relating to penalties has been practically held unconstitutional by the Supreme Court of the United States. As to these penalties, Mr. Justice Peckham, delivering the opinion of the Supreme Court in *Consolidated Gas Company* v. *Wilcox, as Chairman, etc., and Others* (212 U. S., 19), said, in part:

> "We are of the same opinion as to the penalties provided for a violation of the acts. They are not a necessary or inseparable part of the acts, without which they would not have been passed. If these provisions as to penalties have been properly construed by the Court below, they are undoubtedly void within the principle decided in *ex parte Young*

(209 U. S., 123, and the cases there cited), because so numerous and overwhelming in their amount."

It appears from an affidavit of said Edward Swann, filed in this suit with the Clerk of the District Court of the United States for the Southern District of New York, that the office of the District Attorney of the County of New York is not equipped to undertake the defense of a suit of this character and that the office of the District Attorney of the County of New York is concerned primarily with the prosecution of criminal offenses, and it further appears that the District Attorney of the County of New York is a necessary defendant in the above-entitled suit largely because of what might be called a statutory accident.

While the Corporation Counsel of The City of New York at the request of the defendant Edward Swann, District Attorney of the County of New York, is solicitor of the latter in this action, said District Attorney was made a defendant solely because of the penalty sections in the statute assailed and thus the Corporation Counsel of The City of New York is in no position to adequately represent and protect the interests of The City of New York.

The defendant Lewis Nixon, constituting the Public Service Commission of the State of New York, First District, was made a party to this cause of action for the reason that it is provided by Section 75 of the Public Service Commission Law (Chapter 429 of the Laws of 1907) that whenever the said Commission shall be of opinion that a gas company is failing or omitting to do anything required by law, or is doing anything con-

trary to or in violation of law, the said Commission shall direct their counsel to begin proceedings in the Supreme Court of the State of New York to have such action prevented by injunction or mandamus.

VII. Section 2 of Article XII of the Constitution of the State of New York above mentioned classifies cities, defines general and special city laws, and provides for the acceptance of laws relating to the property affairs and government of cities by the Mayors of such cities.

VIII. The Legislature of the State of New York passed in 1913, Chapter 247 of that year, known as the "*Home Rule Law*," which grants to the City

> "power to regulate, manage and control its property and local affairs and is granted all the rights, privileges and jurisdiction necessary and proper for carrying such power into execution. No enumeration of powers in this or any other law shall operate to restrict the meaning of this general grant of power or to exclude other powers comprehended within this general grant."

Among the specific powers granted to the City by this act are the following:

> "To maintain order, enforce the laws, protect property and preserve and care for the safety, health, comfort and general welfare of the inhabitants of the city and visitors thereto; and for any of said purposes to regulate and license occupations and businesses."

The term "general welfare" as used in the law just quoted, is defined in Section 21 of said law as follows:

> "§21. *Public or municipal purpose and general welfare defined.* The terms 'public or municipal purpose' and 'general welfare' as used in this article, shall each include the promotion of education, art, beauty, charity, amusement, recreation, health, safety, comfort and convenience, and all of the purposes enumerated in the last preceding section."

IX. Also in the year 1913 the Legislature of the State of New York passed Chapter 442 of that year amending the "Executive Law" by adding Section 68 thereof, which provides in part as follows:

> "Whenever the constitutionality of a statute is brought into question upon the trial or hearing of any action or proceeding, civil or criminal, in any court of record of original or appellate jurisdiction, the court or justice before whom such action or proceeding is pending, may make an order directing the party desiring to raise such question to serve notice thereof on the attorney-general, and that the attorney-general be permitted to appear at any such trial or hearing in support of the constitutionality of such statute. The court or justice before whom any such action or proceeding is pending may also make such order upon the application of any party thereto, and the court shall make such order in any such action or proceeding upon motion of the

attorney-general. When such order has been made in any manner herein mentioned it shall be the duty of the attorney-general to appear in such action or proceeding in support of the constitutionality of such statute."

X. The Greater New York Charter as amended provides, in part, as follows:

"Section 255.

* * * The corporation counsel, except as otherwise herein provided, shall have the right to institute actions in law or equity, and any proceedings provided by the code of civil procedure or by law, in any court, local, state or national, to maintain, defend and establish the rights, interests, revenues, property, privileges, franchises or demands of the city or of any part or portion thereof or of the people thereof, * * *"

The respondent herein, the Consolidated Gas Company of New York, uses the streets of The City of New York and enjoys the protection of its fire, police, water and other departments and The City of New York levies taxes upon said respondent corporation herein under the provisions of law and from many points of view of municipal administration is interested in the respondent herein and its operation. The price of gas and its supply or lack of supply for light, heat and power purposes is a matter of serious consideration of The City of New York, who are consumers of the respondent, the Consolidated Gas Company of New York, and affects their health, happiness, comfort and convenience. Under the express pro-

visions of said Chapter 247 of the Laws of 1913 the City must preserve and care for the comfort and general welfare of the People of the City who are consumers of the respondent, the Consolidated Gas Company of New York, and therefore must protect and advise them against this attack upon this legislative gas rate fixed by Special City Act in their favor at 80c. per 1,000 cubic feet of gas sold.

XI. One of the issues necessarily involved in this litigation is the cost of producing and distributing gas. The confiscatory character of this rate may depend upon the 75-cent rate allowed The City of New York. The factors which go to make up the 80-cent rate and the 75-cent rate are so closely related and connected that it is impossible to separate them in this rate litigation and to say which elements going to constitute the rate apply to the 80-cent and which apply to the 75-cent rate.

As a result of this litigation the Special Master and the Court will have to make and approve findings of fact as to the cost of manufacturing and distributing gas. Should it be determined that the 80-cent rate charged to consumers generally is confiscatory and that it denies to the Consolidated Gas Company a fair return upon its investment, such a finding will undoubtedly influence not only legislation, but it will also endanger the interests of the City in any litigation which may be brought to test the constitutionality of the 75-cent rate.

Therefore, in order to protect the 75-cent rate in this litigaton, the City of New York should be allowed to intervene as a necessary and proper party defendant.

XII. The above entitled action in which this appeal has been taken went to trial before a Referee on July 22, 1919, and the complainant completed its case on December 23, 1919. The defendants, the Attorney General, the Public Service Commission for the First District of the State of New York and the District Attorney of the County of New York have yet to put in their defense and it is likely that the trial of this action will be finished on or about the 15th day of March, 1920.

I have been informed by James D. Maher, Esq., Clerk of the Supreme Court of the United States in Washington, D. C., in a letter dated October 29, 1919, that the appeal in the above entitled action "will hardly be reached in the regular call of the docket for more than a year." Thus it appears that if this appeal be not advanced by special order of this Court it will be reached only after the trial of the above entitled action shall have been finished and the same shall have been terminated without the City of New York having had an opportunity to present its defense as a party defendant.

XIII. Actions have also been brought by the following gas companies operating within The City of New York to have declared unconstitutional said Chapter 125 of the Laws of 1906, to wit:

1. East River Gas Company of Long Island City.
2. The New York Mutual Gas Light Company.
3. Northern Union Gas Company.
4. Central Union Gas Company.

5. The Standard Gas Light Company of The City of New York.
6. New Amsterdam Gas Company.
7. Brooklyn Union Gas Company.
8. New York and Queens Gas Company.

The City of New York has not been made a party to any of these suits and the actual trials thereof have not yet been commenced.

It is my purpose as Corporation Counsel of the City of New York to make a motion in each of said suits in the District Court of the United States for the Southern District of New York in which district said suits are now pending for an order of said Court permitting The City of New York to be made a party defendant therein similar to the motion made in the above entitled case which was denied by Judge Julius M. Mayer, District Judge of the Southern District of New York, and which order was confirmed by the Circuit Court of Appeals for the Second Circuit and from which said order of confirmation the above entitled appeal was taken.

If this honorable Court does not allow the above entitled appeal to be advanced and if the same be not heard at an early date The City of New York will be out of the above entitled case as a party defendant and also out of said other eight cases and on the trial of the above entitled action and of said actions it will have had no opportunity whatsoever to present facts and arguments in support of the constitutionality of said Chapter 125 of the Laws of 1906 and to defend the constitutionality of said Chapter 736 of the Laws of 1905.

XIV. The record in this appeal has already been filed with the Clerk of the United States Supreme Court since on or about October 9, 1919, and said Clerk has also received from The City of New York a check for $200 to cover the printing of said record and other necessary expenses and appellant's briefs are now ready to serve and file.

XV. On the 6th day of October, 1919, The City of New York petitioned the Supreme Court of the United States for a writ of certiorari to review said order of the Circuit Court of Appeals and same was denied.

Wherefore your petitioner asks this Honorable Court for an order or direction under Rule 26 of the Rules of the Supreme Court of the United States advancing the above entitled appeal on the docket of said Court for argument to the first Monday in February, 1920, or such earlier particular day as to this Honorable Court may seem proper.

~~Dated, January 8, 1920.~~

Dated, January 12, 1920.

WILLIAM P. BURR,
Corporation Counsel of
The City of New York,
Municipal Building,
Borough of Manhattan,
New York City.

THE SUPREME COURT.

Consolidated Gas Company of New York,
Complainant-Appellee,
—*against*—
Charles D. Newton, *et al.*,
Defendants,
" City of New York,
Appellant.

State of New York, }
County of New York, } ss.:

William P. Burr, being duly sworn, says that he has been duly designated as Corporation Counsel of The City of New York, and as such that he is an officer of the Appellant in the above-entitled action. That the foregoing petition is true to his knowledge except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true. That the grounds of his belief as to all matters not therein stated upon his knowledge are as follows: Information obtained from the books and records of the Law Department and other departments of the City government, and

from statements made to him by certain officers or agents of the said City.

WILLIAM P. BURR.

Sworn to before me this 12th day of January, 1920.

L. S.

MATTHEW F. DUFFY, Notary Public, Kings Co. No. 117; Kings Co. Register's No. 1005; New York Co. Clerk's No. 5; New York Co. Register's No. 1128; Bronx Co. Clerk's No. 9; Bronx Co. Register's No. 2118; Queens Co. Clerk's No. 1201. Term expires March 30, 1921.